



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

December 29, 1993

Ms. Cynthia J. Hill  
Supervising Attorney  
City of Austin  
Department of Law  
P.O. Box 1088  
Austin, Texas 78767-8828

OR93-100

Dear Ms. Hill:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code (former V.T.C.S. article 6252-17a).<sup>1</sup> Your request was assigned ID# 18077.

The City of Austin (the "city") has received a request for proposals submitted to the city in response to Request for Proposal No. 920237-3MN to implement the Architectural Barrier Removal Program of the Home Maintenance Program. You have submitted to us proposals submitted to the city by the Austin Area Urban League, Inc., (the "Urban League") (Exhibit A) and the United Cerebral Palsy Association of the Capitol Area, Inc., ("UCPA/CA") (Exhibit B). You claim that this information is excepted from required public disclosure by former sections 3(a)(1) and 3(a)(10) of the Open Records Act (now found at sections 552.101 and 552.110, respectively, of the Government Code).

Pursuant to section 552.305 of the Government Code, we have notified the Urban League and UCPA/CA and have solicited arguments in support of your assertion that the requested information is excepted from required public disclosure by section 552.110. In response, we have received letters from both parties. The Urban League claims that portions of its proposal are excepted from required public disclosure by former section

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<sup>1</sup>The Seventy-Third Legislature repealed article 6252-17a, V.T.C.S. Acts 1993, 73d Leg., ch. 268, § 46, at 988. The Open Records Act is now codified in the Government Code at chapter 552. *Id.* § 1. The codification of the Open Records Act in the Government Code is a nonsubstantive revision. *Id.* § 47.

3(a)(10) of the Open Records Act as information constituting "trade secrets" and "commercial or financial information." While UCPA/CA neither expressly asserts the section 552.110 exception nor claims that its proposal contains information constituting "trade secrets" or "commercial or financial information," it does claim that its proposal is "proprietary."

Section 552.110 protects the property interests of private persons by excepting from required public disclosure two types of information: (1) trade secrets, and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. Commercial or financial information is excepted under section 552.110 only if it is privileged or confidential under the common or statutory law of Texas. Open Records Decision No. 592 (1991) at 9.<sup>2</sup>

The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 (1990) at 2. Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. *It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business, . . . [but] a process or device for continuous use in the operation of the business. . . .* [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

Restatement of Torts § 757 cmt. b (1939) (emphasis added). If a governmental body takes no position with regard to the application of the "trade secrets" branch of section

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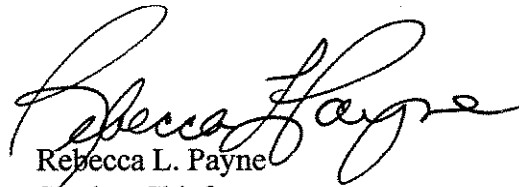
<sup>2</sup>The city claims that the requested information is excepted from required public disclosure under the "commercial or financial information" branch of section 552.110 because its release would either 1) impair its ability to obtain the information in the future or 2) cause substantial harm to the competitive position of the person from whom the information was obtained, citing Open Records Decision Nos. 494 (1988) and 309 (1982). Past open records decisions issued by this office relied on federal cases ruling on exemption 4 of the federal Freedom of Information Act (FOIA) in applying section 552.110 to commercial information. *See National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). However, in Open Records Decision No. 592, the logic of relying on federal interpretations of exemption 4 of FOIA was reexamined. As a consequence of this reexamination, open records decisions relying on federal interpretations of exemption 4 in construing section 552.110 were overruled.

552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5-6.<sup>3</sup>

We have examined the documents submitted to us for review and have considered the respondents' arguments in support of their contentions that their proposals or portions thereof are excepted from required public disclosure by section 552.110. We conclude that neither the Urban League nor UCPA/CA has established a *prima facie* case that the requested information constitutes "trade secrets." *See also* Open Records Decision No. 554 (1990). Moreover, neither of the respondents have demonstrated that any of the requested information is privileged or confidential under the common or statutory law of Texas. Accordingly, the requested information may not be withheld from required public disclosure under section 552.110 of the Government Code and must be released in its entirety.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact our office.

Yours very truly,



Rebecca L. Payne  
Section Chief  
Open Government Section

RLP/SA/GCK/rho

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<sup>3</sup>The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319, 306 (1982); 255 (1980). When an agency or company fails to provide relevant information regarding factors necessary to make a section 552.110 claim, there is no basis to withhold the information under section 552.110. *See* Open Records Decision No. 402 (1983).

Ref.: ID# 18077  
ID# 18284  
ID# 18285

Enclosures: Submitted documents

cc: Ms. Linda Moore Smith  
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